Supreme Court, U.S.
FILED

No. 031300 JAN 24 2004

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October 2003 Term

IN RE: NOMINATION PAPER OF
ARTHUR L. ZULICK as
Candidate of the Reform Party for the
office of Judge of the Court of Common
Pleas for the 43rd Judicial District
(Monroe County, Pennsylvania)

Objection of: JENNIFER ANN WISE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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Petitioner

QUESTION PRESENTED

1. Did Sections 912.2(a), 951 (e)(5) and 976 (e) of the Pennsylvania Election Code deny Zulick and the Reform Party equal protection of the laws by permitting cross-filing and fusion in an election for judge by the Republican and Democratic candidates but not the Reform party candidate?

Suggested answer: Yes.

PARTIES TO THE PROCEEDING

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Statutes

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S.Cobbie & S.Siskind,
Fusion: Multiple Party Nomination
in the United States, 8 (1993) 15

Citations of opinions and orders below

In Re Zulick, 832 A.2d 572, (Pa. Commonwealth 2003), *affirmed*, 834 A.2d 1126 (Pa. 2003)

Statement of Jurisdiction

The opinion of the Commonwealth Court of Pennsylvania dated September 19, 2003, 832 A.2d 572 (2003) appears as Appendix A to this petition. The order of the Pennsylvania Supreme Court dated October 28, 2003, affirming the decision of the Pennsylvania Commonwealth Court is attached as Appendix B.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257, which states that writs will be issued from "final judgments and decrees rendered by the highest court of a State in which a decision could be had."

Constitutional Provision Involved

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, Section 1.

Statement of The Case

The Pennsylvania Election Code allows Republicans and Democrats to cross-file and "fuse" their primary candidates for trial court judge. The Code does not allow minor political party candidates to do so.

Arthur L. Zulick (Zulick), a registered Republican, ran as a Republican candidate in the spring 2003 primary. He also "cross-filed" as permitted under the Pennsylvania Election Code, on the Democratic ticket, and appeared on both ballots in the May primary election. Mark P. Pazuhanich (Pazuhanich), a registered Republican ran on both tickets as did Jennifer Ann Wise (Wise), a registered Democrat.

Zulick received the greatest number of votes in the primary (5,336), Pazuhanich received 4,696 votes and Wise received 3,971 votes. However, Pazuhanich received the most votes in the Republican primary and Wise received the most votes in the Democratic primary, so they became their party's candidates and Zulick did not.

The Reform party is a minor political party in Pennsylvania which nominates its candidates in the summer by convention. Zulick was contacted by the Reform party leadership following his losses in the May primary and was invited to become the Reform party candidate for judge of the Court of Common Pleas of Monroe County.

Zulick circulated nomination papers which were accepted by the Commonwealth Bureau of Elections on July 30, 2003. Wise filed an objection to Zulick's nomination papers on August 8, 2003, citing provisions of the Pennsylvania Election Code which provide that a person who runs in the Republican or Democratic primary may not become the candidate for that office of a minor political party.

Zulick filed an answer to the petition, raising the question of the constitutionality of the Pennsylvania Election Code. Zulick's answer stated:

> Petitioner Jennifer Ann Wise lost the Republican nomination that she sought in the primary and is continuing to run on the Democratic ticket, and Mark P. Pazuhanich lost the Democratic nomination that he sought, and is continuing to run on the Republican ticket. Only the minor political party is prevented by Pennsylvania law from cross-filing a candidate, which is invidious discrimination, not supported by a compelling state interest. *See Reform Party of Allegheny County v. Allegheny County Department of Elections,* 174 F.3rd 305 (3rd Cir. 1999). The Pennsylvania statute cited by Petitioner is unconstitutional because it denies Zulick equal protection of the laws and the right to free association under the First and Fourteenth Amendments to the United States Constitution ... *Answer to Wise petition, paragraph 10.*

Notice of Zulick's challenge to the constitutionality of Pennsylvania's election code was

given to the Pennsylvania Attorney General, then Mike Fisher.

The parties stipulated to the facts in the case in a hearing before the Commonwealth Court. The Commonwealth Court heard argument and ruled on September 19, 2003 that the Election Code was constitutional and that Zulick's name would not appear on the ballot.

Zulick filed a timely appeal of this decision to the Pennsylvania Supreme Court, on September 23, 2003. The Pennsylvania Supreme Court denied the appeal without opinion on October 28, 2003.

ARGUMENT

THE SECTIONS OF THE PENNSYLVANIA ELECTION CODE WHICH PREVENT A MINOR POLITICAL PARTY CANDIDATE FOR JUDGE FROM CROSS-FILING OR FUSING WHEN REPUBLICAN AND DEMOCRATIC CANDIDATES ARE ALLOWED TO DO SO ARE UNCONSTITUTIONAL

This a petition for writ of certiorari arising from a decision of the Supreme Court of Pennsylvania which found that Sections 2911 (e) (5) and 2936(e) of the Pennsylvania Election Code do not violate Zulick's constitutional rights to run for the position of judge on the Monroe County Court of Common Pleas as the candidate of the Reform Party. This holding is at odds with a decision by the U.S. Third Circuit Court of Appeals in *Reform Party of Allegheny County v. Allegheny County Department of Elections,* 174 F.3d 305 (3rd Cir. 1999) which held that these sections of the Election Code were unconstitutional because they denied the Reform Party equal protection of the laws. The Pennsylvania Supreme Court did not write an opinion in this case; it affirmed a decision of the Commonwealth Court. The Commonwealth Court discussed the *Reform Party* opinion in its decision, it did not distinguish it and made its ruling in direct contradiction to it.

Zulick filed nomination papers for the position of Common Pleas Judge with the Pennsylvania Department of State, Bureau of Elections on July 30, 2003, containing the requisite number of signatures to

be placed upon the Reform party ballot for that election. He had earlier unsuccessfully run as a cross-filed candidate on both the Republican and Democratic tickets. Zulick completed the affidavit provided by the Bureau of Elections, which did not require him to address whether he had filed nomination petitions in the spring Republican and Democratic primary.

The Bureau of Elections did not require Zulick to affirm that he was not a candidate in the primary because the United States Court of Appeals for the Third Circuit ruled in *Reform Party of Allegheny County v. Allegheny County Department of Elections,* 174 F.3d 305 (3rd Cir. 1999) that Section 951 (e) (5) and 976 (e) of the Pennsylvania Election Code, 25 P.S. Section 2911 (e) (5) and 2936 (e) were unconstitutional. The *en banc* Third Circuit decision addressed the Pennsylvania Election Code ban on minor party "cross-nominations" in local offices including, among others, judge of the court of common pleas, school board and district justice, found in 25 P.S. Sections 2911 (e)(5) and 2936(e). These statutes prevented minor political parties from choosing a candidate in elections for school board or judge when that candidate had already filed nomination petitions for the position in the primary. The major political parties, however, were allowed to engage in cross-nomination, or "fusion" for those local offices, which are referred to as non-partisan offices.

The *Reform Party* decision involved two challenges by the Patriot Party. In the first, the Patriot Party had attempted to nominate Michael Eshenbaugh for school director . The nomination was

barred by the application of the fusion ban, because Eshenbaugh had already sought the nomination of both major parties in the primary election that year. He had secured the nomination of the Democratic Party, but not that of the Republican Party.

The second challenge concerned the candidacy of Barbara Childress for school board. She filed nomination petitions for school board in the Republican and Democratic primaries, and also sought the nomination of the Patriot Party. After winning both the Republican and the Democratic primaries, she was denied the right to run on the Reform party.

The *Reform Party* court described the structure of the challenged statutes:

> As a minor political party the Patriot Party does not file "nomination petitions" for the primary elections, as do the major political parties. Instead the Patriot Party, like other minor political parties, must file "nomination papers" containing the number of signatures specified by Pennsylvania law. 25 P.S. Section 2872.
>
> Section 2936 (e) of the Pennsylvania Code prohibits the filing of a nomination paper "if the candidate named therein has filed a nomination petition for any public office for the ensuing primary, or has been nominated for any such office by nomination papers previously filed..." Furthermore, Section 2911 (e)(5) requires that:

> (t)here shall be appended to each nomination paper... an affidavit of each candidate nominated therein, stating- (5) that his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the ensuing primary election, nor has he been nominated by any other nomination papers filed for any such office...
>
> The above sections of the election code apply only to the "nomination papers" filed by minor parties and not to "nomination petitions" filed by the major parties participating in the primaries. Thus, while Section 2870 (f) of the Pennsylvania election code expressly allows the major parties to cross-nominate candidates for school director, Sections 2936 (e) and 2911 (e)(5) prevent such cross-nomination by minor political parties.
>
> *Reform Party,* 174 F.3d 308, n.5.

The *Reform Party* court held that "Pennsylvania's decision to ban cross-nomination by minor parties and to allow cross-nomination by major parties constitutes the type of "invidious discrimination" prohibited by the Fourteenth Amendment." Id. at 313.

The *Reform Party* court followed the decision of the United States Supreme Court in *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed. 2d 589 (1997) and used an "intermediate level of scrutiny" to consider any plausible justification advanced by the State to justify the challenged statutes. The imposition of burdens on new and/or

minor political associations struggling for a foothold among the electorate triggers this intermediate level of scrutiny. Application of this heightened scrutiny must take into account the invidious facial discrimination imposed by the Pennsylvania Election Code. *Reform Party*, 174 F.3d at 314-315; *Anderson* 460 U.S. at 793 n.16 ("[B]ecause the interests of minor parties and independent candidates are not well represented in . . . legislatures . . . [the risk to fundamental rights] may warrant more careful judicial scrutiny").

The Commonwealth Court decision relied upon the argument that the Pennsylvania statutes were justified to keep "sore losers" from the primary out of the general election. The *Reform Party* court dismissed this argument:

> "the Pennsylvania laws only "prevent sore loser candidacies insofar as they prevent a candidate who failed to win either major party primary from running as a minor party candidate in the general election." *Patriot Party I,* 95 F. 3d at 265. The laws are too broad, however, because they bar a third party from nominating a candidate such as Ms. Childress even though she did not lose either primary race and was thus not a sore loser. They are too narrow because they do not prevent candidates like Mr. Eshenbaugh from continuing on as the Democratic candidate even though he had lost the Republican primary. *Id. at 317.*

The *Reform Party* case also refused to accept arguments that there would be voter confusion, ballot clogging, a bleeding-off of votes of independent voters and a squelching of interest in encouraging new candidates to run as independent voters as justification for the discriminatory laws.

The term "sore loser" as used in the Commonwealth Court opinion is applicable for all offices **except** the non-partisan offices for which the Election Code permits political parties to cross-file and allows minor political parties to cross-file with severe restrictions. The "sore loser" and "happy winner" concepts used by the Commonwealth Court (opinion, *Appendix,* pages 18-21) should not be applicable in the case of cross-nomination. For offices where cross-nomination is possible there can be no "sore loser" until a candidate exhausts the limited number of parties with ballot position, which in the case of Monroe County would be Republican, Democrat, Libertarian, Green and Reform.

The Pennsylvania Election Code "scheme" gives each of these parties ballot position as political parties or minor political parties. It treats them differently as to cross-filing by not allowing minor political parties to nominate someone who ran in the political party primary. The Third Circuit Court ruling in *Reform Party,* holding this limitation unconstitutional, allowed each candidate one opportunity to gain the nomination of each party. Under this holding, each candidate and each party is treated equally. There is no special treatment for minor political parties as compared to other parties.

The Commonwealth Court decision turns that result upside down. Each candidate and each party is not treated equally. The Commonwealth Court decision provides the Republican and Democratic Party electors with special treatment, imposing restrictions on other parties for cross-nomination and fusion that do not exist for the major political parties. If the Commonwealth Court decision is upheld, the Republican and Democratic electors would have veto power over Reform, Libertarian or Green candidates. If a Reform, Green or Libertarian party-member cross-files onto the Republican Primary ballot during that primary and loses, under the result dictated by the Commonwealth Court Order, that candidate would be barred from running on his own party's ballot line in the November Election. If the Republican electors reject a Democratic candidate cross-nominated on the Republican primary ballot, the Democrat could still win the Democratic ballot line and run in the November election. A candidate who lost the Republican primary but did not seek the Democratic nomination would still be barred from seeking the cross-nomination of a minor political party.

The Election Code requirement that only political party candidates may cross-file burdens the voters who support the minor political party. Since these voters may be precluded from voting for their favored candidate, they must choose between casting their ballot for either a political-party candidate who is not their first choice for the office being filled, an unsatisfactory minor political party candidate or not voting at all. *Reform Party*, 174 F.3d at 314; *Patriot*

Party 1, 95 F.3d at 269. As the Supreme Court recognized in *Anderson*, 460 U.S. at 793-794:

> A burden that falls unequally on new or small political parties or on independent candidates. . . discriminates against those candidates and - of particular importance - against those voters whose political preferences lie outside the existing parties.

The cross-filing limitation may prevent a minor political party from forming a critical type of consensual political alliance that would help it build support in the community. Thus, the challenged laws help to entrench the decided organizational advantage that the major parties hold over new political associations struggling for existence. *Reform Party*, 174 F.3d at 314; *quoting, Patriot Party* 1, 95 F.3d at 269. This burden is exacerbated where the established parties are able to combine their strength by cross-nominating each other's candidates and the minor political party is denied that opportunity.

The Commonwealth Court stated that if the Third Circuit's decision were followed, allowing a minor political party to nominate someone who cross-filed in the political party primary, "that would discriminate against other candidates who, if a minor party was required to hold a primary, could challenge the party's endorsed choice and "shanghai" the nomination process." (*Opinion of the Commonwealth Court, Appendix, page 19).* This rationale overlooks the fact that the election process offered to a minor party does not have to be the same as that of a major

political party as long as there is not invidious discrimination:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. (A State is not) guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.
>
> *American Party of Texas v. White,* 415 U.S. 767, 782 n.13 (1974)

There is no discrimination if this Court follows the Third Circuit ruling, because all parties, large and small, are allowed to cross-file. If that result is not palatable to the major political parties, the remedy should be a legislative one that reconsiders the manner of judicial elections for common pleas court in the Commonwealth.[1] If cross-filing is not to be made

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1 In *Timmons,* Justice Rehnquist pointed out that statutes allowing fusion are the exception, not the rule. "(t)oday, multiple party candidacies are permitted in just a few states, and fusion plays a significant role only in New York." He also clarified that Minnesota's fusion ban applied to all candidates, across the board:

available to all in Pennsylvania, then it should be available to none:

> Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959. A candidate in one party primary may not now run as an independent; and he must not have been associated with another political party for a year prior to the primary.
>
> *Storer et. al. v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed. 2d 714 (1974)

> The ban, which applies to major and minor parties alike, simply precludes one party's candidate from appearing on the ballot, as that party's candidate, if already nominated by another party. *Timmons,* 137 L.Ed.2d at 599.

The *Timmons* Court also noted in a footnote:

> The practice of multiple party nomination in the 20th Century has, of course, been much more limited. This owes chiefly to the fact that most state legislatures...outlawed the practice... Multiple party nomination is prohibited today, either directly or indirectly in about forty states and the District of Columbia. *Timmons*, footnote 6; *S. Cobble &. S. Siskind*, Fusion; Multiple Party Nomination in the United States, 8 (1993)

a. The Commonwealth Court's decision does not follow Timmons and is based upon dicta in Storer

The Commonwealth Court decision disregards other United States Supreme Court decisions that have rejected the idea that major political parties may have unequal beneficial treatment. The decision in *Timmons, supra,* also supports Zulick's position on the constitutional infirmity of Sections 912.2(a), 951 (e)(5) and 976 (e) of the Election Code, 25 P.S. Sections 2872.2(a), 2911 (e)(5) and 2936 (e). Justice Rehnquist wrote for the majority in *Timmons* about a Minnesota "anti-fusion" statute. There the New Party sought to nominate Andy Dawkins, a Minnesota state representative who was running unopposed in the Minnesota Democratic Farmer Labor Party primary. Dawkins was then chosen by the New Party as their candidate for the same office in the 1994 general election. "Fusion" candidacies had been prohibited in Minnesota since 1901. Dawkins' nomination petition was refused by local election officials because he had already been nominated by another party for the same election. The New Party challenged the constitutionality of the anti-fusion law on freedom of association grounds.

The *Storer* decision was cited as finding that the (disaffiliation) "provision did not discriminate against independent candidates." *Timmons* at 604. *Burdick v. Takushi,* 504 U.S. 428, (1992) was also cited for the proposition that "we have repeatedly upheld reasonable, **politically neutral** regulations that have the effect of channeling expressive activities at the polls. 504 U.S. at 437-438. (emphasis added)

The *Timmons* court held that the anti-fusion law was constitutional, under free association analysis, in part because it applied equally to all parties:

> The statutory scheme in *Timmons* differs from the Pennsylvania scheme in a manner crucial for the equal protection analysis. *Timmons* involved an across-the-board ban on fusion by both major and minor parties. In contrast, the Pennsylvania statutes involve a ban on cross-nomination that facially discriminates against minor parties by allowing major parties, but not minor parties, to cross-nominate in certain circumstances. Reform Party at 312.

Pennsylvania imposes these unequal burdens on the right to vote... without protecting any countervailing state interest. *Reform Party* at 315.

The *Storer* decision, which the Commonwealth Court cites as supporting the "sore loser" rationale, does not stand for that proposition. The language in *Storer* regarding "sore loser" was *dicta,* because the case did not involve someone who ran, lost and tried to get on the minor party ticket. *Storer* was a disaffiliation case. *Storer* actually supports Zulick's position in this controversy, because *Storer* recognized that a statute that discriminated by imposing a disaffiliation requirement against an independent candidate alone would not be constitutional, and defended the statute because it was neutral as to all

candidates.[2] The statutes here are not neutral; they allow unfettered cross-filing and fusion only for the Republicans and Democrats.

The Commonwealth Court summarized the extent of the burden caused to the Reform Party by the facially discriminatory statutes of the Election Code:

> Balancing then the importance of the state's interest in foreclosing the nomination of "sore losers," *Storer v. Brown*, and the reasons set forth in *Timmons* justifying the burden imposed on minor political parties, under the intermediate level of scrutiny standard, we find, though not trivial, those burdens are not so "severe" so as to declare Sections 951(e)(5) and 976 of the Election Code unconstitutional. Foreclosing it from nominating a "sore loser" does not restrict the ability of the minor political party and its members to endorse, support or vote for anyone they like; instead it only limits the minor political party's access to the ballot by reducing the universe of potential candidates who may appear on the ballot as the party's nominee by ruling out those few individuals who have lost on a primary ballot. *Opinion, Appendix, page 18.*

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2 The *Storer dicta* was also improperly relied upon by the Commonwealth Court in *Substitute Nomination Certificate of Moran,* 739 A.2d 1168 (Pa. Cmwlth. 1999).

This analysis overlooks the huge advantage the Pennsylvania statutes give to the political parties by allowing them to fuse their candidates. There can be no greater burden than to require the minor political parties to face the steamroller of a fused Republican and Democratic candidate coming out of their primaries:

> If anything, the current statutory scheme may discourage independent candidates. A three-way race against two major party candidates would be formidable enough for an independent candidate. An independent candidate would face an even greater challenge running against a candidate nominated by both major parties. *Reform Party* at 318.

The facts in this case demonstrate another reason why the Reform Party is disadvantaged. Zulick received the most votes in the primary. All three candidates were cross-filed. Zulick received 1,365 more votes than Wise and 640 more votes than Pazuhanich. Zulick had a realistic chance of winning the general election, even on the Reform Party ticket. If the Reform party had the same chance to cross-nominate as the political parties, they may be able to enlist a candidate who actually gives them the chance to win. Again, there is no "sore loser" in a cross-filed race until all parties have nominated their candidates.

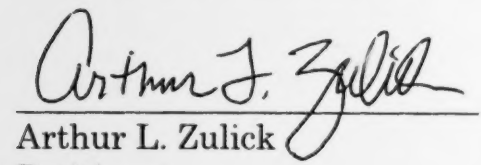
Zulick requests the United States Supreme Court to issue a writ of certiorari to the Pennsylvania Supreme Court in this case. The Pennsylvania Election Code provisions at issue in this case have been found

to be unconstitutional by an *en banc* ruling of the Third Circuit Court of Appeals. The Pennsylvania Supreme Court has chosen not to follow that ruling. The current Pennsylvania election laws have denied Zulick equal protection of the laws.

CONCLUSION

Petitioner Arthur L. Zulick requests the United States Supreme Court to grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDIX

A Opinion and Order of the Commonwealth Court of Pennsylvania, September 19, 2003

B. Order of the Pennsylvania Supreme Court, October 28, 2003

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re:	*
	*
Nomination Paper of Arthur	*
L. Zulick As Candidate of the	*
Reform Party For the Office	*
of Judge of the Court of	*
Common Pleas for the 43rd	*
Judicial District (Monroe	*
County)	*
	*
Objection of:	*
	* No. 534 M.D. 2003
Jennifer Ann Wise,	* Argued September
Petitioner	* 9, 2003

OPINION BY Judge PELLEGRINI
FILED: September 19, 2003

Before this Court is a petition filed by Jennifer Ann Wise (Wise) to set aside the nomination paper of Arthur L. Zulick (Zulick) as a candidate of the Reform party in the November 4, 2003 municipal election for the office of Judge of the Court of Common Pleas for Monroe County, Pennsylvania, the 43rd Judicial District.

In May of 2003, Zulick was cross-filed on the Republican and Democratic ballots as a candidate for the office of Judge of the Court of Common Pleas of

Monroe County,[1] but was defeated on both tickets. Following his loss in the primary, Zulick was contacted by the Reform party, a minor political party[2] in Monroe County, and invited to become the Reform party candidate. Zulick circulated papers for his nomination[3] and after acquiring the requisite number of signatures, filed them with the Pennsylvania Department of State, Bureau of Elections on July 30, 2003. As part of that filing, he completed a candidate's affidavit which he alleged did not require him to declare that he had been a candidate in the Republican and/or Democratic primary.

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1 Also running on the ballot were Wise and Mark P. Pazuhanich.

2 "Minor political party" is defined as:

> a political party as defined in section 801(a) or (b) whose State-wide registration is less than fifteen per centum of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

Section 912.2(a) of the Election Code, Act of June 3, 1937, P.L. 1333, as amended, added by the Act of February 19, 1986, P.L. 29, 25 P.S. § 2872.2(a).

3 See 25 P.S. § 2872.2(a).

Wise then filed a petition in this court to set aside Zulick's nomination paper contending that because he ran on both the Republican and Democratic ballots in the May 2003 primary, he was forbidden from being a Reform party candidate in the November 2003 general election. Citing *In Re: Substitute Nomination Certification of Moran,* 739 A.2d 1168 (Pa.Cmwlth.1999), she contends that Sections 951(e)(5) and 976(e) of the Election Code, 25 P.S. §§ 2911(e)(5)[4] and 2936(e),[5] require him to state in the affidavit that his name had been presented as a candidate for both the Democratic and Republican

---

4

25 P.S. § 2911(e)(5) provides:

There shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein, stating--

* * *

(5) that his name has not been presented as a candidate by nomination petitions for any public office to be voted for at the ensuing primary election, nor has he been nominated by any other nomination papers filed for any such office.

5

25 P.S. § 2936(e) prohibits the filing of a nomination paper if the candidate named therein has filed a nomination petition for any public office for the ensuing primary or has been nominated for any such office by nomination papers previously filed.

nominations in the primary election of May 20, 2003, thereby precluding the Reform party from nominating him as a candidate.[6] She further contends that such provisions are constitutional because the General Assembly placed such provisions in the Election Code to preclude so-called "sore loser" candidates, i.e., candidates who lose a major party primary but run on a minor party ticket in the general election. See Storer

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6

At the time Zulick filed his affidavit, the Department of State did not enforce the requirements in Sections 951(e)(5) and 976(e) of the Election Code, 25 P.S. §§ 2911(e)(5) and 2936(e), because it relied upon the Third Circuit's decision in Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305 (3rd Cir.1999), allowing any political party and political body to cross-file for the office of judge of a court of common pleas and not enforce the statute's prohibition of both minor political parties and political bodies from nominating for any office a candidate whose name appeared on the primary ballot as a candidate for nomination by any of the major political parties for the same office. See Department of State's March 6, 2003 memorandum. However, after our decision in Moran was filed, the Department of State changed its position explaining that the holding in Moran was controlling and that minor political parties and political bodies were again prohibited from nominating for any office a candidate whose name had appeared on the primary ballot as a candidate for nomination by any of the major political parties for the same office. See Department of State's August 12, 2003 memorandum.

v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Citing *Reform Party of Allegheny County v. Allegheny County Department of Elections (Patriot Party II)*, 174 F.3d 305 (3rd Cir.1999), Zulick responds by contending that those provisions are unconstitutional because they violate the equal protection rights of minor party candidates by prohibiting the cross-nomination of candidates by minor parties but not by major parties.

Because *Moran* is a decision of this court and would control, its applicability will be addressed first. Moran was the unsuccessful candidate in both the Democratic and Republican primary election in 1999 for the office of District Justice in Magisterial District 45-3-04 in Lackawanna County. After the primary, the Lackawanna Reform Committee, an independent political body[7] whose candidate had withdrawn, nominated Moran for the office of District Justice.

7

The Election Code makes the distinction between a "political body" and a "political party" as follows: a "political party" is a group that receives more than a certain number of votes at the preceding general election and is permitted to select its candidates by the primary election method after which the prospective candidate places his or her name on the primary ballot by filing a nomination petition. Any other political group is a "political body" and must select its candidates by filing nomination papers. See Section 801 of the Election Code, 25 P.S. § 2831; Packrall v. Quail, 411 Pa. 555, 192 A.2d 704 (1963).

When objections were made to the Substituted Nomination Certificate, the Court of Common Pleas of Lackawanna County dismissed the objections stating that "unsuccessfully seeking the nomination of a political party during the primary election does not preclude the substitution of such a defeated candidate as a political body's candidate in the ensuing November General Election." 739 A.2d at 1169. However, on appeal, we reversed, noting that this matter involved a political body rather than a political party and held that the substitution was prohibited under Section 980 of the Election Code[8] because a political body could not substitute as its candidate any person who had been a political party candidate which Moran had been in the primary election.

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Section 980 of the Election Code provides:

A political body may substitute an individual as its candidate....

Provided, however, That no substitute nomination certificate shall nominate any person who was a candidate for nomination by any political party for any office to be filled at the ensuing November election, whether or not nominated for such office by such political party, or who has already been nominated by any other political body for any office to be filled at the ensuing November or special election. (Emphasis added.)

25 P.S. § 2940.

We noted in *Moran* that in *Storer v. Brown*, the United States Supreme Court upheld the constitutionality of a similar California election statute which prohibited a candidate from switching to an independent party for one year following an unsuccessful attempt to secure either the Democratic or Republican party nomination in the primary election. We also observed that the provision at issue prevented losers from continuing to struggle and limited the names on the ballot to individuals who had won the primaries. We held that Section 980 of the Election Code was not unconstitutional because it was "a legitimate effort on the part of the Pennsylvania General Assembly to provide clear choices to the electorate and to preclude so-called 'sore-loser' candidacies." 739 A.2d at 1172.

Moran, while instructive, is not controlling because it dealt with the Lackawanna Reform Committee as a political *body*, not as a political *party*, which is at issue in this case, and it also dealt with the *substitution* of a candidate, not the *nomination* of a candidate, which involved different sections of the Election Code than are at issue in this case.

While *Moran* would have been controlling if it dealt with the same factual situation, even though it discussed in *dicta* whether the challenged provisions violated equal protection when a minor party desired to nominate "sore losers," the Third Circuit's decision in *Patriot Party II*, 174 F.3d 305, is also not controlling because it dealt with whether a minor party could nominate a "happy winner" and not a "sore loser" of a major party's primary where cross-filing was

permitted. In any event, even if it had an identical factual situation, it still would not be controlling because decisions of intermediate federal courts are not binding on state courts. See *Weaver v. Pennsylvania Board of Probation and Parole*, 688 A.2d 766 (Pa.Cmwlth.1997). *See also Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). *Patriot Party II* was the reconsideration of the Third Circuit's decision in *Patriot Party of Allegheny County v. Allegheny County Department of Elections (Patriot Party I)*, 95 F.3d 253 (3rd Cir.1996). While not controlling for those reasons, nonetheless, like *Moran*, it is still instructive.

In the *Patriot Party* cases, the Patriot party, a minor political party, alleged that Sections 951 and 976 of the Election Code prevented it from nominating its chosen candidate, Michael Eshenbaugh, for school director in violation of its right of free association and right to equal protection of the laws. Eshenbaugh had previously been nominated by the Democratic party but lost his bid for the Republican nomination, and the Patriot party also desired to nominate him by petition for school director in the North Allegheny School District, even though he had also won the Democratic primary. In determining whether the Patriot party's right of freedom of association had been violated, the Third Circuit utilized a fact intensive balancing test to weigh the burden on the minor party against the importance of the interest that the state offered to justify the burden. "If the burden on the plaintiff's rights is severe, the state's interest must be compelling and the law must be narrowly tailored to serve the state's interests." *Id.* at 258.

The Patriot party alleged and the Third Circuit agreed that the restrictions in the statute prevented it from nominating the individual whom the Patriot party thought would be the most effective person to advance its platform and deprived the Patriot party of an opportunity to "fuse" its votes with those of a major party and make inroads into the political process.[9] "By preventing cross-nomination and fusion, Pennsylvania's election laws burdened the Patriot Party's ability to choose a candidate and to organize and gain influence in the political system." *Id.* at 263. The Third Circuit rejected the County Department of Elections' argument, i.e., that restrictions on cross-nomination by minor parties only imposed a minimal burden on a party's free association rights because the election laws only allowed cross-filing by the major parties in races for three local offices, finding that limitation on the effect of an election was not dispositive.

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9 The Third Circuit explained that minor parties were usually unable to garner sufficient votes to win the general election, and voters who supported the minor party's platform were reluctant to waste their votes on minor party candidates who had no real chance of winning. However, cross-nominations allowed voters to vote for a minor party without wasting their votes on a candidate who had no chance of winning the election because a voter simply voted for the candidate on any one of the party tickets and then the general election votes that the candidate received on each party ticket were added together to determine the winner.

The Third Circuit also rejected the Department of Elections' argument that the election laws furthered four important state interests:[10] 1) preventing "sore loser" candidacies; 2) preventing individual candidates from monopolizing the ballot and causing voter confusion; 3) preventing a candidate from bleeding off votes of independent voters to bolster his or her major party endorsement; and 4) encouraging new candidates to run as independents. Regarding the issue of a "sore loser," the Third Circuit found that the law was both too broad and too narrow in its discrimination because, while the Election Code prevented a "sore loser" candidate who did not win a major party primary from running as a minor party candidate in the general election, it did not bar a minor party from nominating a candidate even if that individual did not lose either primary race and was not a "sore loser." It also did not prevent a candidate from continuing on as a Democratic candidate, for example, if he had lost the Republican primary. As to minor party candidates monopolizing the ballot and/or causing voter confusion, the Court found no evidence of either and stated that Pennsylvania still retained the authority to set reasonable requirements for parties seeking admission to the ballot. As to the third and fourth reasons advanced, the Court found that this was not a question of candidates bleeding off minor

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10 The Commonwealth of Pennsylvania inexplicably did not participate in the Patriot Party cases even though notice of the proceeding was given to the Attorney General of Pennsylvania.

party votes but rather a voluntary transfusion of minor party support to a major party candidate, and that cross-nominations would not increase a major party's share of minor party votes unless the minor party voluntarily nominated the major party candidate as its own. Finally, there was no evidence that a minor party's cross-nomination of a willing major party candidate would disrupt political parties in any way. Consequently, the Third Circuit held that the election laws' prohibition of cross-nomination by minor parties violated the Patriot party's right of free association.

The Third Circuit then addressed the issue of the violation of the Patriot party's equal protection of the law. Measuring the totality of the burden that the law placed on the voting and associational rights of the Patriot party and individual voters against the justification that the County Department of Elections offered to support the state election laws, the Court concluded that the Pennsylvania election laws treated major and minor parties differently and violated equal protection.

After *Patriot Party I* was decided, the United States Supreme Court issued its decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), a case involving Minnesota's election laws that prohibited a candidate from appearing on the ballot as the candidate of more than one party. Unlike the Pennsylvania election laws in *Patriot Party I* that only involved a ban on cross-nominations by minor parties, the Minnesota election laws involved an across-the-board ban on cross- nominations by both major and minor parties.

Also, *Timmons* did not address the equal protection issue raised in *Patriot Party I,* but only the issue of freedom of association. In considering that issue, the Supreme Court weighed the character and magnitude of the burden Minnesota's election laws imposed on the rights of potential candidates against the interests it contended justified that burden and considered the extent to which its concerns made the burden necessary. The Supreme Court ultimately held that Minnesota's election laws prohibiting cross-nominations did not violate the freedom of association because it did not severely burden the political party's associational rights:

> In sum, Minnesota's laws do no restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the Party's access to the ballot. They are silent on parties' internal structure, governance, and policy making. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the Party's ability to send a particularized message, to its candidate and to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights--though not trivial--are not severe.

520 U.S. at 363, 117 S.Ct. 1364.

Based on the holding in *Timmons*, the Department of Elections in *Patriot Party II* requested a rehearing before the Court of Appeals *en banc*. The Court was asked to determine to what extent its earlier decision in *Patriot Party I* remained good law in light of *Timmons*. The Court held that *Timmons* did not overrule the equal protection analysis and holding of *Patriot Party I* because the Minnesota election law upheld in *Timmons* banned cross-nominations by all political parties, whereas the Pennsylvania election laws at issue only banned cross-nominations by minor political parties yet allowed them by major political parties. The Court went on to perform an identical analysis of the burden placed on the minor party and its voters versus the state interest in prohibiting cross-nominations in determining that there was a violation of equal protection. It again reviewed the four state interests advanced by the Department of Elections to allow the prohibition: 1) preventing "sore loser" candidacies; 2) preventing individual candidates from monopolizing the ballot and causing voter confusion; 3) preventing a candidate from bleeding off votes of independent voters to bolster his or her major party endorsement; and 4) encouraging new candidates to run as independents. The Court did not find any of the state interests so compelling or weighty to allow the invidious discrimination in violation of minor parties' right to equal protection of the laws to continue.

Because neither *Moran* nor *Patriot Party II* are controlling, we must conduct our own analysis to

determine whether the challenged provisions violate the Fourteenth Amendment to the United States Constitution.

"Voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Illinois Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)). However, the right to vote and the right to "associate for political purposes through the ballot" are not absolute. *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059. The Constitution provides that states may prescribe, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and following that constitutional mandate, the Supreme Court has recognized that states retain the power to regulate their own elections. *See e.g., Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2861, 37 L.Ed.2d 853 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

In the states' exercise of that power, the Supreme Court has stated that "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 441, 112 S.Ct. 2059 (quoting *Storer v. Brown*, 415 U.S. at 730, 94 S.Ct. 1274 (1974)). In fashioning "some sort of order," election laws will

invariably impose some burden upon individual voters and political parties, especially those rights guaranteed by the First and Fourteen Amendment to the United States Constitution. Each provision of an election code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

Where there is a challenge to a provision of an election law, the Supreme Court, in *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982), stated the following regarding the analysis to be used to determine whether a violation had been made out when there had been an allegation that an Election Code provision violated the Equal Protection Clause to the United States Constitution:

> The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them. See, e. g., McDonald v. Board of Election Comm'rs, 394

U.S. 802, 808-809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1218, 6 L.Ed.2d 393 (1961). We have departed from traditional equal protection principles only when the challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

Thus, we must first determine whether the provisions challenged in this case deserve "scrutiny" more vigorous than that which the traditional principles would require.[11] Far from

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Under a typical Fourteenth Amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type--classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review or a heightened standard of review. See Nicholson v. Combs, 550 Pa. 23, 703 A.2d 407 (1997).

recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." Ibid. In assessing challenges to state election laws that restrict access to the ballot, this Court has not formulated a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions. Ibid.; Williams v.

The heightened standard of review lessens the presumption that a statute is constitutional because it allows the court to weigh the proffered reasons why the restrictions are against the rights purportedly being infringed upon. Strict scrutiny goes even farther, as Tribe, American Constitutional Law (Second Edition), Section 16-6 quipped: "[w]hen expressed as a standard for judicial review, strict scrutiny is ... 'strict' in theory and usually 'fatal' in fact."

Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

Our ballot access cases, however, do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the "availability of political opportunity." Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). This Court has departed from traditional equal protection analysis in recent years in two essentially separate, although similar, lines of ballot access cases.[12]

* * *

The second line of ballot access cases involves classification schemes that impose burdens on new or small political parties or independent candidates. See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); Storer v. Brown, supra; American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); Williams v. Rhodes, supra. These cases involve

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12 The first line of ballot access cases mentioned involved classifications based on wealth which is not at issue in this case.

requirements that an independent candidate or minor party demonstrate a certain level of support among the electorate before the minor party or candidate may obtain a place on the ballot. In these cases, the Court has emphasized that the States have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections. To this end, the Court has upheld reasonable level-of-support requirements and classifications that turn on the political party's success in prior elections. See Storer v. Brown, supra; American Party of Texas v. White, supra; Jenness v. Fortson, supra. The Court has recognized, however, that such requirements may burden First Amendment interests in ensuring freedom of association, as these requirements classify on the basis of a candidate's association with particular political parties. Consequently, the State may not act to maintain the "status quo" by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates. See Williams v. Rhodes, supra, at 25, 89 S.Ct. 5.

* * *

It does not automatically follow, of course, that we must apply traditional equal protection principles ... merely because these restrictions on candidacy do not fall into the two patterns

> just described. But this fact does counsel against discarding traditional principles without first examining the nature of the interests that are affected and the extent of the burden these provisions place on candidacy. See Bullock v. Carter, supra, 405 U.S. at 143, 92 S.Ct. at 855; Storer v. Brown, supra, 415 U.S. at 730, 94 S.Ct. at 1279. Not all ballot access restrictions require "heightened" equal protection scrutiny. The Court, for example, applied traditional equal protection principles to uphold a classification scheme that denied absentee ballots to inmates in jail awaiting trial. McDonald v. Board of Election Comm'rs, 394 U.S. at 807-811, 89 S.Ct. at 1407-1409.

Id. at 963-966, 102 S.Ct. 2836.

The first issue that must be addressed in deciding whether Sections 951 and 976 of the Election Code, 26 P.S. § 2911(3)(5) and § 2936(e), violate the Equal Protection Clause to the United States Constitution by not allowing minor parties to nominate as their candidate for an office in the general election candidate who stood for office in the primary where cross-filing was permitted is to determine which level of scrutiny is appropriate. In *Timmons*, the United States Supreme Court applied an intermediate level of scrutiny in which "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the [minor party's] rights." 520 U.S. at 364, 117 S.Ct. 1364 (citing *Norman*, 502 U.S. at 288-89, 112 S.Ct. 698). Under this standard, the Court indicated that it would not "require

elaborate, empirical verifications of the weightiness of the State's asserted justifications." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986)). Once the justification is advanced, under the intermediate level of scrutiny standard, the court is to weigh against the burdens imposed any plausible justification the state has advanced for imposing unequal burdens on major and minor parties. *Cf. Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.") While *Timmons* involved an associational rights analysis, it is equally applicable to an equal protection analysis.

At the outset of our equal protection analysis, it should be noted that the Supreme Court has held that the different treatment of minor political parties from other political parties does not violate their equal protection. In *American Party of Texas v. White,* 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), the question was raised whether an election law requiring that large parties hold primary elections but also mandating that smaller parties nominate by convention violated the First or Fourteenth Amendments. In holding the provision valid, the Court stated:

> Neither can we take seriously the suggestion made here that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by

> convention, rather than by primary election. We have considered the arguments presented, but are wholly unpersuaded by the record before us that the convention process is invidiously more burdensome than the primary election.... If claiming an equal protection violation, the appellant's burden was to demonstrate in the first instance a discrimination against them of some substance. Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution. Appellants' burden is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election. The procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other.

Id. at 781-82, 94 S.Ct. 1296 (internal quotation marks and citations omitted). The Court further reasoned that:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating

> things that are different as though they were exactly alike.

Id. at 782, n. 13, 94 S.Ct. 1296 (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-491, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971)).

We then need to determine whether Sections 951 and 976 of the Election Code, 26 P.S. § 2911(3)(5) and § 2936(e), invidiously discriminate against minor parties because they "unfairly or unnecessarily burden the availability of political opportunity" as those provisions do not allow them to nominate a losing candidate that took part in the type of primary election that allowed candidates to cross-file in the other party's primary. To do so, we need to determine whether the prohibition gives major party nominees an unfair advantage over minor party nominees placing a greater burden on minor parties from appearing on the ballot. For several reasons, we hold that it does not.

First, the important state interests advanced by the state in *Timmons* that the Supreme Court found justified impinging on the right of freedom of association are equally applicable to whether the provisions here violate equal protection because those interests also establish that treating minor and major political parties differently do not "unfairly burden the political *opportunity" of minor parties. Balancing then the importance of the state's interest in foreclosing the nomination of "sore losers," *Storer v. Brown*, and the reasons set forth in *Timmon*'s justifying the burden imposed on minor political parties, under the intermediate level of scrutiny standard, we find,

though not trivial, those burdens are not so "severe" so as to declare Sections 951(e)(5) and 976 of the Election Code unconstitutional. Foreclosing it from nominating a "sore loser" does not restrict the ability of the minor political party and its members to endorse, support or vote for anyone they like; instead, it only limits the minor political party's access to the ballot by reducing the universe of potential candidates who may appear on the ballot as the party's nominee by ruling out those few individuals who have lost on a primary ballot. Moreover, even if we were to permit a "sore loser" to be on the ballot, that allowance would discriminate against other candidates and other political bodies. If we were to hold that a minor party could select a "sore loser" by nomination, that would discriminate against other candidates who, if a minor party was required to hold a primary, could challenge the party's endorsed choice and "shanghai" the nomination process, as well as discriminate against other political bodies who could not nominate "sore losers."

Second, a statutory scheme that favors minor parties necessarily cannot so "unfairly burden" the minor party as to constitute invidious discrimination. Sections 951(e)(5) and 976 of the Election Code are part of an overall legislative scheme that was enacted to aid the minor party, not to harm them. The requirement that minor parties are to nominate candidates only through the nomination process is done in part so that that the minor parties, which have gained support at the general election of member of other parties and independents, can continue to appear on the general election ballot, even though it may not have enough members of its own party to have

sufficient signatures to even nominate a candidate for a primary. For example, a candidate for judge in Monroe County is required to obtain 250 signatures of party electors to run on that party's primary ballot. 25 P.S. § 2872.1(28). In this case, because the Reform party only had 94 registered electors as of the 2003 primary, it did not have enough signatures to even get a candidate on the ballot in the primary election. Absent nominating a candidate in the primary, if it was treated the same as a "major party," it would then be precluded from fielding a candidate in the general election. Even if a minor party had more than 250 registered minor party members, making it possible for it to nominate a candidate in a primary where cross-filing is permitted, it would practically be impossible for the party to field a candidate unless it had hundreds, if not thousands, of registered voters. This is so because if a number of candidates take out petitions, including all minor party members, that number would have to increase substantially, taking into consideration that other candidates could also solicit signatures from some party members who always refuse to sign any petition or cannot be contacted. Even if one candidate could get 250 signatures, nothing would prevent the nomination from being "shanghaied" by a better organized and well-known Democrat or Republican who could obtain the signatures for that party's nomination and win the election. Because a minor party is guaranteed to run a candidate in the general election which may not be able to run otherwise, the provisions here do not constitute invidious discrimination.

Finally, there is no "unfair burden on the political opportunity of a minor party" so as to constitute invidious discrimination in precluding a "sore loser" from being a candidate in the general election because no political party, minor political party or political body under the Election Code is allowed to nominate a "sore loser," and no "sore loser" is allowed to run on another party's ballot that he did not win or lose on in the general election. In effect, what is being challenged in this case is not that "sore losers" are not being treated the same, but that minor political parties are being treated unequally because they are foreclosed from participating in primary elections and some candidates might not be available. However, when the Supreme Court in *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974), upheld the statutory scheme of not allowing minor political parties to participate in the primary election, any effect that followed was a necessary result of the protection afforded to the minor parties by not going through primaries and, as *Timmons* held, just because a few candidates are not available, that does not amount to invidious discrimination required to make out an equal protection claim.[13]

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Because only the issue of a "sore loser" is at issue in this case, we decline to address whether a minor party can nominate a "happy winner" of a major party primary where cross-filing is permitted as was the issue in the 3rd Circuit's decision in Patriot Party II.

Accordingly, because we find that Sections 951(e)(5) and 976 of the Election Code are constitutional, Wise's petition to set aside Zulick's nomination paper is granted.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re:	*
	*
Nomination Paper of Arthur L. Zulick As Candidate of the Reform Party For the Office of Judge of the Court of Common Pleas for the 43rd Judicial District (Monroe County)	*
	*
Objection of:	*
	* No. 534 M.D. 2003
Jennifer Ann Wise, Petitioner	*

ORDER

AND NOW, this 19th day of September, 2003, the Petition to Set Aside the Nomination Paper of Arthur L. Zulick is granted.

DAN PELLEGRINI, JUDGE

Supreme Court of Pennsylvania.

In re Nomination Paper of Arthur L. ZULICK as Candidate of the Reform Party for the office of Judge of the Court of Common Pleas for the 43rd Judicial Circuit (Monroe County),

Objection of Jennifer Ann Wise,

Appeal of Arthur L. Zulick.

Submitted Oct. 6, 2003.

Decided Oct. 28, 2003.

Appeal No. 238 MAP 2003 from the Published Opinion and Order of the Commonwealth Court (Pellegrini and Leadbetter, JJ. and Kelley, S.J.) at Docket Number 534 MD 2003, dated September 19, 2003.

Robertson B. Taylor, Bethlehem, for Arthur L. Zulick, Appellant.

Howard Greeley Hopkirk, D. Michael Fisher, Harrisburg, for the Com. of PA, Appellee.

Gregory M. Harvey, Philadelphia, for Jennifer Ann Wise, Appellee.

Before: CAPPY, C.J., and CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and LAMB, JJ.

Prior report: 832 A.2d 572.

ORDER

PER CURIAM.

AND NOW, this 28th day of October, 2003, the Order of the Commonwealth Court is AFFIRMED.

Pa.,2003.

In re Zulick

834 A.2d 1126

(2)

No. 03-1300

Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR L. ZULICK,

Petitioner,

v.

JENNIFER ANN WISE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether the instant Petitioner, a life-long enrolled member of a major political party who for more than two decades had voted in each primary election of that major political party, was deprived of his individual constitutional rights through the enforcement by the court below of the statutory limitation that prevents an individual who contested a primary election and lost that contest from being nominated to the same office by the circulation of nomination papers?

Question 2.

Whether the instant Petitioner is an appropriate party to litigate *pro se* the constitutionality of a state election law limitation on nominations by minor political parties, when the instant Petitioner is a life-long enrolled member of a major political party and when no minor political party attempted either to intervene in the proceeding below or to be heard as *amicus curiae*?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the state courts of Pennsylvania were limited to Petitioner Arthur L. Zulick, who was the Respondent-Candidate below, and Respondent Jennifer Ann Wise, who was the Petitioner-Objector below.

In accordance with its usual practice, the Office of the Attorney General of Pennsylvania, although given formal notice of Petitioner Zulick's defense below asserting that the provisions of state law relied on by Respondent Wise violated the Equal Protection Clause, declined to intervene in the state proceeding and filed briefs only as *amicus curiae*. Although named as a Respondent in the instant Petition for a Writ of Certiorari, that Office has declined to participate in this Court, thus leaving to counsel for Respondent Wise the burden of defending the constitutionality of the Pennsylvania statutes.

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JURISDICTION

Respondent agrees that Petitioner Zulick timely petitioned for a writ of certiorari pursuant to 28 U.S.C. § 2101(c) and that this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

COUNTER-STATEMENT OF THE CASE

Petitioner Arthur L. Zulick (herein sometimes "Petitioner" or "Zulick") has been enrolled in the Republican Party since 1979 and had voted in the Republican primary in each year since 1979 up to the time of the hearing in the proceeding below (Stipulation at ¶ 2). In the May 20, 2003 primary election, Zulick contested both the Republican and Democratic nominations for the elective office of Judge of the Court of Common Pleas (43rd Judicial District, Monroe County, Pennsylvania) and lost the Republican primary to a registered Republican and lost the Democratic primary to a registered Democrat, Respondent Jennifer Ann Wise.

Following his primary election defeats, Zulick circulated nomination papers to nominate himself as the candidate of the Reform Party. The Reform Party of Monroe County held the status of a "minor political party" as defined in Section 912.2 of the Pennsylvania Election Code ("Nominations by Minor Political Parties"), added by Act 1986-11, P.L. 29, § 8, 25 P.S. § 2872.2,[1] because a

[1] In this Brief in Opposition, the statutory citations are to the official statutory "Pamphlet Laws," abbreviated as "P.L.," sometimes referred to outside Pennsylvania as "session laws," and to the unofficial

(Continued on following page)

candidate of the Reform Party achieved at least five percent of the vote in Monroe County in the 2002 November election, but the Reform Party does not have registered voters equal to fifteen percent of the total state-wide voter registration. This definition of a minor political party, as is demonstrated *infra* at page 7, was enacted for the benefit of minor political parties because such entities frequently – perhaps generally – achieve ballot line status by obtaining five percent of the vote in a particular district but without having sufficient enrolled members (voters who have registered as members of the minor political party) to circulate nomination petitions and hold a meaningful primary election (Pennsylvania primary elections are "closed," meaning that only voters registered as enrolled members of a party may vote in the primary elections of that party).

Respondent Jennifer Ann Wise, a registered elector of Monroe County and the nominee of the Democratic Party for the office of Judge of the Court of Common Pleas in the November 2003 election, timely filed and served an objection (titled under the state procedure as a "Petition to Set Aside Nomination Paper") to Zulick's candidacy. At the initial hearing in the Commonwealth Court before a single Judge, on August 20, 2003, the pertinent facts were stipulated concerning Zulick's status as an enrolled Republican and Wise's standing as a registered elector and opposing candidate. No evidence was offered concerning

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statutory compilation "Purdon's Pennsylvania Statutes Annotated," abbreviated as "P.S.," because those forms of citation have been used both in the Petition and in the decision below of the Commonwealth Court of Pennsylvania.

the participation or involvement, if any, of the Reform Party in the circulation of Zulick's nomination paper (Hearing transcript at 6) and the Reform Party did not intervene in the proceeding. Zulick contended that the statutory limitation on the candidacy by nomination papers of an individual defeated in the primary election for the same office, Section 951(e)(5) of the Election Code, 25 P.S. § 2911(e)(5), was unconstitutional because the enforcement of that limitation within Allegheny County had been enjoined by a federal district court as to persons who had either won major party nominations or who were seeking those nominations, and that decision had been reaffirmed by the United States Court of Appeals in *Reform Party of Allegheny County v. Allegheny County Department of Elections,* 174 F.3d 305 (3d Cir. 1999) (*en banc*) (sometimes referred to as "*Patriot Party II*").

Following the hearing on August 20th, the Commonwealth Court listed the case for argument on September 9, 2003 before a three-Judge panel. By an Opinion and Order filed and entered September 19, 2003, the Commonwealth Court sustained the constitutionality of section 951(e)(5), 25 P.S. § 2911(e)(5), as applied to a so-called "sore loser" candidate such as Zulick, who had been defeated for the same nomination in the primary election, and expressly reserved for future consideration ("we decline to address") whether "a minor party can nominate a 'happy winner' of a major party primary where cross-filing is permitted as was the issue in the 3rd Circuit's decision in *Patriot Party II.*" Opinion below, Petitioner's Appendix at A-26 n.13.

From the Order granting the petition to set aside his nomination paper, Zulick filed a timely appeal to the Supreme Court of Pennsylvania. After receiving briefs on

an expedited schedule, the Supreme Court of Pennsylvania unanimously affirmed the Order of the Commonwealth Court in a *per curiam* Order filed October 28, 2003. Petitioner's Appendix at B-1.

REASONS THAT THE PETITION SHOULD BE DENIED

A. Petitioner Zulick, who is a life-long enrolled member of one of the major political parties, is not an appropriate litigant to test in this Court the constitutionality of the application of the Pennsylvania Election Code to minor political parties.

1. The stipulated facts established in the court below that Petitioner Zulick was a life-long registered Republican who had voted in each annual Republican Primary Election since 1979.

The evidence received at the hearing in the Commonwealth Court established that Petitioner Zulick was not only a life-long Republican but also a Republican who had never failed to vote in his party's annual primary election. No evidence was offered that Zulick had any commitment to or interest in the political positions espoused by the Reform Party or that he intended to enroll as a member of the Reform Party.

2. No evidence was presented below that Petitioner Zulick ever intends in the future to seek the nomination of any minor political party.

In the hearing in the Commonwealth Court there was no evidence presented to show that Zulick had any intention to seek the nomination of a minor political party, other than in the election cycle of 2003.

3. Although Petitioner Zulick now asserts that he is litigating in this Court individually and on behalf of the Reform Party, a minor political party, the Reform Party neither attempted to intervene as a party in the proceeding below nor sought to be heard as *amicus curiae*.

Although Zulick attempts in his statement of the "Question Presented" to appear to be litigating to vindicate the rights of the Reform Party, it is notable that the Reform Party neither attempted to intervene as a party in the proceeding below nor sought to be heard as *amicus curiae*. Only after the Commonwealth Court had denied an application for a stay of its Order directing that Zulick's name not be printed on the ballots did the Reform Party of Monroe County bring an action in the United States District Court for the Middle District of Pennsylvania against the Pennsylvania officials responsible for elections and seeking an injunction to prevent Zulick's name from being omitted from the ballots.[2] But the Reform Party

[2] The action was captioned *The Reform Party of Monroe County v. Pedro A. Cortes, Secretary, Manna Accurti, Commissioner and*

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abandoned that action following the District Court's dismissal pursuant to the *Rooker-Feldman* doctrine[3] without taking an appeal to the United States Court of Appeals for the Third Circuit. Under these circumstances, this Court should await a case brought by a minor political party, or at least brought by a professed adherent of a minor political party, before revisiting the constitutional issues posed by "sore loser" restrictions preventing seriatim candidacies.

Commonwealth of Pennsylvania Department of State, No. 3: CV 03-1799, filed October 9, 2003.

[3] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

B. The Pennsylvania Legislature's different treatment in the state Election Code of nomination of candidates by direct primary election, on the one hand, and the nomination of candidates by the signing of nomination papers, on the other hand, does not constitute a denial of equal protection to candidates of minor political parties.

1. The Pennsylvania Legislature has determined that if the selection of candidates is by a direct primary election, there is less need to impose limitations on the eligibility of candidates because the secret vote cast in the primary election will tend to prevent individuals from manipulating the nomination process for personal advantage, but if the selection of candidates is solely by the signing of nomination papers, there is a need to impose limitations to prevent such manipulation.

As recognized by the Commonwealth Court in a carefully-considered analysis of the precedents of this Court in cases involving state election statutes,

> [T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .

Opinion at A-22-23, quoting from *American Party of Texas v. White*, 415 U.S. 767, 782 n.13 (1974), in turn quoting from *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971).

Because of those "differences in kind," the structure of the Pennsylvania Election Code distinguishes between the nomination of candidates by primary elections and the nomination of candidates by nomination papers, without a primary election.

This structure of the Pennsylvania Election Code reflects the belief that the nomination of candidates by an actual secret ballot of party members in a primary election is a method that can be trusted to result in a choice of candidates that cannot easily be manipulated by party leaders or by prominent individuals who may desire to achieve selfish individual objectives.

Conversely, the structure of the Election Code reflects the belief that when the nomination of candidates does not involve an actual secret ballot case in a primary election, there should be limitations to prevent manipulation of the nomination process. One such perceived manipulation was the independent political body nomination of Richard S. Caliguiri as candidate for Mayor of the City of Pittsburgh in the general election of November 8, 1977. Opponents of Mayor Caliguiri, who had succeeded to the office by virtue of his position as president of city council, unsuccessfully sought to remove him from the ballot on various grounds, including the allegation that because he had agreed at the time he accepted the presidency of council that he would not run for mayor in the ensuing primary, he should be estopped from running on an independent ticket in the next ensuing general election. *In re Caliguiri*, 4 D.&C. 3d

1 (C.P. Allegheny 1977). In declining to remove Mayor Caliguiri from the November ballot the court stated:

> This court cannot legislate. The legislature might also have enacted a disaffiliation statue forbidding a candidate who has been a registered member of a political party for one year from running as an independent. There is no such statute in Pennsylvania and, of course, this court may not engraft such a qualification of the election laws. In short, there is no legal obstacle to Caliguiri's candidacy.

4 D.&C. 3d at 21-22.

The Legislature reacted to the controversy surrounding Mayor Caliguiri's nomination (and subsequent election) by enacting the disaffiliation limitation, Section 951.1 of the Election Code, added by the Act of July 12, 1980, P.L. 649, 25 P.S. § 2911(e)(6) and (7), and § 2911.1 ("Limitations on eligibility of candidates").

The limitation at issue in the instant case can be traced back to the original Election Code of June 3, 1937, P.L. 1333, § 951(e)(5) ("that his name has not been presented as a candidate by nomination petitions for the same office to be voted for at the ensuing primary election, nor has he been nominated by any other nomination papers filed for the same office"), 25 P.S. § 2911(e)(5). The language of Section 951 has been amended twice since the 1980 addition of the disaffiliation requirement, including by Act 1998-18, P.L. 72, which reenacted sub-section (e) by deleting certain language but leaving intact the text of sub-section (e)(5).

2. The Pennsylvania legislative determination in 1986 that minor political parties should select candidates by nomination papers, rather than by primary elections, was explicitly intended to benefit minor political parties, which were unable to conduct primary elections following an earlier increase in the number of signatures required for nomination petitions.

As recognized by The Commonwealth Court, the creation of the category of "minor political parties" by the Legislature in Act 1986-11, approved February 19, 1986, was intended to benefit minor political parties by resolving a serious constitutional issue.

The first reported decision dealing with that constitutional issue was *Fraenzl v. Secretary of the Commonwealth*, 83 Pa. Cmwlth. 539, 478 A.2d 903 (1984), involving the Socialist Workers Party, which had achieved the percentage of the vote necessary to be on the ballot as a "political party," but which had only three registered members within the political district. Because the party had only three registered voters within the district, it was impossible for a candidate to circulate a nomination petition because the party had fewer members than the minimum number required to sign a nomination petition. Judge Doyle of the Commonwealth Court characterized this situation as "a 'catch 22' which cannot have been intended by the legislature." 478 A.2d at 906. The Commonwealth Court solved the constitutional impasse by ordering that the Socialist Workers Party be permitted to nominate candidates through the circulation of nomination papers.

The "Catch 22" situation adjudicated in *Fraenzl* became even worse when the Legislature, reacting to perceptions of "ballot clutter" such as 299 candidates on the 1983 Philadelphia ballot for Judge of the Court of Common Pleas (39 to be nominated), increased the nomination petition signature requirements by Act 190 of 1984, P.L. 968, 25 P.S. § 2872.1. The Consumer Party and its leaders, which had been able for several years to satisfy the earlier nomination petition requirements, brought suit in the federal district court. The plaintiffs proved that the increased signature requirement in Act 190, although not intended to affect the Consumer Party, had the effect of making it "impossible" for the Consumer Party "to obtain enough signatures to put its candidates on the primary ballot." *Consumer Party v. Davis*, 606 F. Supp. 1008, 1013 (E.D. Pa. 1985). The District Court denied an injunction invalidating Act 190 but ordered that the Consumer Party be permitted on the November ballot through the nomination papers route. The Court of Appeals reversed and remanded for further consideration of an appropriate remedy. *Consumer Party v. Davis*, 778 F.2d 140 (3d Cir. 1985).

On remand, the Consumer Party pressed the District Court for relief prior to the start of the nomination petition circulation period in February 1986. Simultaneously, the Legislative leadership sought to enact legislation creating the category of "minor political party" to moot the Constitutional challenge to Act 190.

The Legislative Journal – House for February 12, 1986 at 232-34 shows that the leaders of both parties were concerned that "there appears to be a Federal judge who may perhaps rule unless we pass legislation" and "there

may well be a ruling over the weekend" (page 232, remarks of the majority leader, Mr. Manderino).

Although by using some bipartisan parliamentary maneuvers the Legislature was able to enact legislation for the benefit of minor political parties in record time on February 12th (a conference report was presented and approved two pages later at page 234), the United States District Court acted that same day to invalidate Act 190. *Consumer Party v. Davis*, 633 F. Supp. 877 (E.D. Pa. 1986).

Following the approval on February 19th by the Governor of House Bill 1000, as amended by the February 12th conference report, that federal district court decision became moot because the constitutional issue had been resolved by the creation of the category of "minor political parties." Act 1986-11, P.L. 29, § 8, adding Election Code § 912.2 ("Nominations by Minor Political Parties"), 25 P.S. § 2872.2. The key language of the new section states:

> (a) Notwithstanding any other provision in this act to the contrary, minor political parties shall nominate all of their candidates for the offices to be filled at the ensuing November election pursuant to section 903 in accordance with the requirements of section 951, other than subsection (e)(6) and (7) thereof, and section 954, and shall obtain the required signatures during the same time frame available to political bodies. Minor political parties shall be subject to the provisions of this act applicable to political parties with respect to special elections, voter registration forms, substituted nominations and all other purposes except as otherwise expressly provided in this section. "Minor political party" shall mean a political party as defined in section 801(a) or (b) whose State-wide registration is less than

fifteen per centum of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

3. In benefiting the minor political parties by permitting their selection of candidates through the circulation of nomination papers, the Legislature also relieved minor political parties of some of the existing limitations on candidates selected by nomination papers, but continued the "sore loser" prohibition that was held to prevent the nomination of the Petitioner.

In enacting Section 912.2, creating the category of "minor political parties," the Legislature relieved "minor political parties" of the disaffiliation limitation enacted following the Mayor Caliguiri controversy, subsections (e)(6) and (7) of Section 951, but retained the limitation in subsection (e)(5) of Section 951 that had been enacted as part of the original Election Code of June 3, 1937, P.L. 1333.

C. The courts of Pennsylvania and the federal courts have repeatedly upheld the statutory limitations on selection of candidates by nomination papers.

The distinction made in the Pennsylvania Election Code between the nomination procedures for political parties and the nomination procedures under Section 951, which are now applicable to minor political parties, have been subjected to repeated attack and the provisions now

at issue have been upheld. In *Williams v. Tucker*, 382 F. Supp. 381, 387 (M.D. Pa. 1974), a three-Judge District Court sustained the constitutionality of an interpretation of the Election Code that would prevent a losing primary candidate from running as a independent candidate. The court in *Williams v. Tucker*, like the Commonwealth Court in *Substitute Nomination Certification of Moran*, 739 A.2d 1168 (Pa. Cmwlth. 1999), relied on this Court's opinion in *Storer v. Brown*, 415 U.S. 724, 734-35 (1974). See *Salera v. Tucker*, 399 F. Supp. 1258, 1268 (E.D. Pa. 1975), *aff'd mem.*, 424 U.S. 959 (1976) (explaining earlier holding in *Williams v. Tucker*).

The decision of *In re Owens*, 436 A.2d 260 (Pa. Cmwlth. 1981), adjudicated a "broad-based attack on the constitutionality" of the disaffiliation requirement in subsection (e)(6) as applied to an individual seeking to file nomination papers for the office of school director. The Commonwealth Court concluded as follows, in an opinion by Judge MacPhail:

> Finally, Appellant makes a broad-based attack on the constitutionality of the mandated affidavit [as required by Section 951(e)(6) of the Election Code, 25 P.S. § 2911(e)(6)]. Our review of the legislation makes it abundantly clear to us that the affidavit denies equal protection to no one nor does it inhibit a citizen's free choice of political party affiliation, deny due process to eligible candidates or infringe upon their civil rights. Rather, we believe the amendment to the Election Code which requires the affidavit was a necessary and laudable effort on the part of the legislature to prevent disappointed candidates from forming their own political conclaves to get their names on a ballot *by circumventing the*

> *provisions of the Election Code which provide for an orderly political process through the operation of the political party system* but which still preserves the rights of those who may prefer to have no political affiliation.

436 A.2d at 261-62 (emphasis added).

In *Baronett v. Tucker*, 365 A.2d 179 (Pa. Cmwlth. 1976) (*en banc*), the Commonwealth Court considered a disingenuous argument that the intent of subsection (e)(5) could be avoided because the language refers to someone who has filed a nomination petition "for the ensuing primary" rather than "for the preceding primary."

> Baronett argues that this section does not bar the filing of nomination papers by a candidate defeated in the preceding primary and that, therefore, his papers should have been accepted. We do not agree.

365 A.2d at 180. The Commonwealth Court noted that the change in filing dates required by the decision in *Salera v. Tucker*, *supra*, had changed the time sequence, but that the legislative intent was nonetheless clear:

> It is clear to us that the purposes for the section of the Code in which the term here concerned appears are to require a candidate to choose between the primary route and the nomination route to the general election ballot and *to prevent a losing primary candidate from filing nomination papers. Williams v. Tucker*, 382 F. Supp. 381 (M.D. Pa. 1974). It is equally clear that a court, guided by the presumption that the legislature does not intend a result that is unreasonable, should give all laws a sensible construction, should ascertain and give effect to the intention

> of the legislature and when necessary, may interpolate additional words.

365 A. 2d at 181 (emphasis added).

D. The constitutional decisions of this Court permit a State to make rational distinctions between selection of candidates by primary election and selection of candidates by nomination papers.

No recent decision of this Court comes close to a holding that would require a State to have exactly uniform provisions for the nomination of candidates through secret ballot primary elections and the nomination of candidates by nomination papers with no primary election process. Certainly there is no holding in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), that requires such uniformity of treatment. The Court of Appeals in *Patriot Party II*, formally styled as *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 312 (1999), quotes one phrase from *Timmons* as if that one phrase represents an equal protection holding of this Court:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, *nondiscriminatory* restrictions.'" *Timmons*, [520 U.S. at 358,] 117 S.Ct. at 1370 (emphasis added). Thus, even though the Court held that the burdens posed by fusion bans on parties and voters are not severe, the Court still maintained a requirement that the restrictions be reasonable

> and nondiscriminatory. Because the Pennsylvania law permits fusion by major parties, but prohibits fusion by minor parties, it is, on its face, discriminatory.

174 F.3d at 312-13 (footnote omitted). Although the Court of Appeals seemed to treat the phrase quoted from *Timmons* as if that phrase represents an equal protection holding of the *Timmons* majority, the quoted phrase in context is merely a recital of the standard of scrutiny as applied in an earlier decision that reversed the Ninth Circuit and upheld Hawaii's prohibition on write-in voting. Here is the phrase as it appears in the *Timmons* opinion:

> Regulations imposing severe burdens on plaintiff's rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable nondiscriminatory restrictions.'" *Burdick, supra,* at 434 (quoting *Anderson, supra*, at 788); *Norman, supra*, at 288-289 (requiring "corresponding interest sufficiently weighty to justify the limitation"). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer, supra*, at 730 ("[N]o litmus paper test . . . separat[es] those restrictions that are valid from those that are invidious. . . . The rule is not self-executing and is no substitute for the hard judgments that must be made").

520 U.S. at 358-59. *Burdick* refers to *Burdick v. Takushi*, 504 U.S. 428 (1992) (sustaining Hawaii's prohibition on write-in voting). Nothing in the *Burdick* decision supports an equal-protection challenge to Pennsylvania's Election

Code. Quite the contrary, the *Burdick* majority expressly approves a "sore loser" rationale for Hawaii's prohibition on write-in voting:

> It [Hawaii's system] could also be frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot. The State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal.

504 U.S. at 440.

Moreover, the Court of Appeals in *Patriot Party II (Reform Party)* fails to recognize that the trend of this Court's decisions in the last decade has been to reverse intermediate federal decisions that have invalidated state election laws. See *Timmons, supra,* 520 U.S. at 359-63.

Finally, the Court of Appeals in *Patriot Party II (Reform Party)* attempts to limit the effect of the two pages in the *Timmons* opinion in which the Supreme Court majority elaborates upon the extent to which "the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . and may temper the destabilizing effect of party splintering and excessive factionalism." *Timmons*, 520 U.S. at 367-68. This Court should follow that portion of the *Timmons* opinion.

E. The Court of Appeals decision relied on by Petitioner is neither binding nor persuasive and the Court of Appeals dealt with a different and distinguishable issue not presented by the instant case and expressly reserved for future determination by the decision below.

The *Timmons* decision in 1997 was the occasion for the *en banc* rehearing that resulted in the decision in *Patriot Party II*. As stated in the opening paragraph of *Patriot Party II,* 174 F.3d at 307:

> In this *en banc* review, we must determine to what extent our earlier decision in *Patriot Party of Allegheny Court v. Allegheny County Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996) (*Patriot Party I*) remains good law in the wake of the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 . . . (1997). In *Patriot Party I*, we held that the Pennsylvania statutes at issue, which in certain local elections bar cross-nomination of candidates by minor parties, but not by major parties, violated the Patriot Party's right to freedom of association under the First and Fourteenth Amendments, as well as its right to equal protection of the laws under the Fourteenth Amendment. We now conclude that the decision in *Timmons*, in upholding a Minnesota "anti-fusion" statute against a First Amendment attack, does not undercut our equal protection analysis in *Patriot Party I*. We will, therefore, reaffirm our holding that the Pennsylvania statutes here, as applied to the local elections in question, violate the Patriot Party's right to equal protection of the laws.

In a footnote, the Court explained that the name of the plaintiff had been changed from Patriot Party of Allegheny

County to Reform Party of Allegheny County but that in "this opinion, we will continue to use the former appellation." 174 F.3d at 307 n.2.

As the quotation *supra* from the opening paragraph of *Patriot Party II* indicates, the issue in both *Patriot Party* decisions was the constitutionality of Pennsylvania's limitations on so-called "fusion" candidacies, in which one party seeks to place on the ballot under its label the name of a candidate who has already been nominated by another party. The decision of the Supreme Court of the United States in the *Timmons* case undermined entirely the *Patriot Party I* holding based on the First Amendment, 95 F.3d at 257-68, but in *Patriot Party II* the *en banc* decision reaffirmed an alternative holding based on a denial of equal protection under the Fourteenth Amendment. Although the decision refers to and disapproves a "sore loser" rationale offered in defense of the prohibition on "fusion" candidacies, that rationale was not a major focus of the decision. See 174 F.3d at 316-17.

Consistent with the focus of the Patriot Party decisions on "fusion" candidacies, the relief granted by the District Court, and reaffirmed in *Patriot Party II*, was a declaration of unconstitutionality limited to Allegheny County and enjoining the defendants in that case, who were the Allegheny County Department of Elections and its Director, from enforcing the provisions of Sections 2911(e)(5) and 2963(e) of 25 P.S. See 174 F.3d at 318 n.13, quoting the District Court's Order. No injunction of statewide effect was sought and none was granted.

As previously noted, the decision of the Commonwealth Court in the instant case expressly reserves for

future determination whether the holding in *Patriot Party II* should be the law of Pennsylvania. Opinion at 21 n.13.

F. The Court of Appeals in *Patriot Party II* was never presented with the accurate rationale for the Legislature's rational distinctions between major political parties that select candidates by direct primaries, minor political parties permitted to use nomination papers, and independent bodies that historically have used nomination papers.

Because the Attorney General and the Pennsylvania Department of State did not participate in the litigation resulting in the two *Patriot Party* decisions, the legislative history concerning "minor political parties" and the compelling rationale for the Legislature's rational distinctions between major political parties that select candidates by direct primaries and minor political parties permitted since 1986 to use nomination papers, and independent bodies that historically have used nomination papers. In the hearing below in the Commonwealth Court on August 20th, the Pennsylvania General Counsel's Office explained that neither the Attorney General nor the Pennsylvania Department of State had participated in the *Patriot Party* litigation and that references in the opinions to the position of the "Department" instead referred to the Allegheny County Department of Elections (Hearing Transcript at 46, Gregory Dunlap, Deputy General Counsel: "All the arguments advanced in that case were advanced by the Solicitor of Allegheny County").

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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